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BEFORE THE SURFACE TRANSPORTATION BOARD

	ENTERED Office of Proceedings
TOTAL PETROCHEMICALS USA, INC. Complainant,	MAY 19 2011 Pert of Public Record
v.	Docket No. NOR 42121
CSX TRANSPORTATION, INC.	
Defendant.)	

REPLY TO MOTION TO REDESIGNATE

Complainant, TOTAL PETROCHEMICALS USA, INC. ("TPI"), hereby replies in opposition to the "Motion to Redesignate" filed by CSX Transportation, Inc ("CSXT") on May 17, 2011 ("Motion"). CSXT's Motion seeks to redesignate as "Confidential" certain workpapers and exhibits that TPI has designated as "Highly Confidential" in its Opening Market Dominance Evidence, filed on May 5, 2011. The information at issue is TPI Exhibit II-B-9, which is a customer e-mail, and {{

TPI concurs in CSXT's request for an expedited decision. TPI has no interest in seeing the procedural schedule strung out even more than it already has been, and is very concerned that CSXT's over-reaching Motion is little more than a ploy to buy more time to reply to TPI's Opening Market Dominance Evidence. In order to minimize the opportunity for CSXT to use this Motion as a delay, TPI has been very responsive to CSXT's correspondence on this subject. Although CSXT's first letter to TPI on Friday, May 6, 2011, asked TPI to respond by Wednesday, May 11, TPI responded on Monday, May 9th. CSXT did not send its second letter to TPI until four days later, on Friday, May 13th, to which TPI responded the very same day.

² Information in {{ double brackets }} has been designated "HIGHLY CONFIDENTIAL" pursuant to the protective order.

should grant CSXT's Motion, TPI requests that the Board first afford TPI the option of withdrawing material from the record as an alternative to disclosing it to CSXT personnel.

CSXT's Motion is based upon two principal arguments. First, CSXT contends that the information designated as "Highly Confidential" is not the type of "commercially sensitive" information that is protected by Paragraph 2 of the Protective Order in this proceeding, served June 23, 2010. Second, CSXT contends that its ability to respond to TPI's Opening Market Dominance Evidence is substantially prejudiced by TPI's "Highly Confidential" designations. CSXT places substantial emphasis on its second contention in a transparent attempt to compensate for the weakness of its first. Neither contention is accurate.

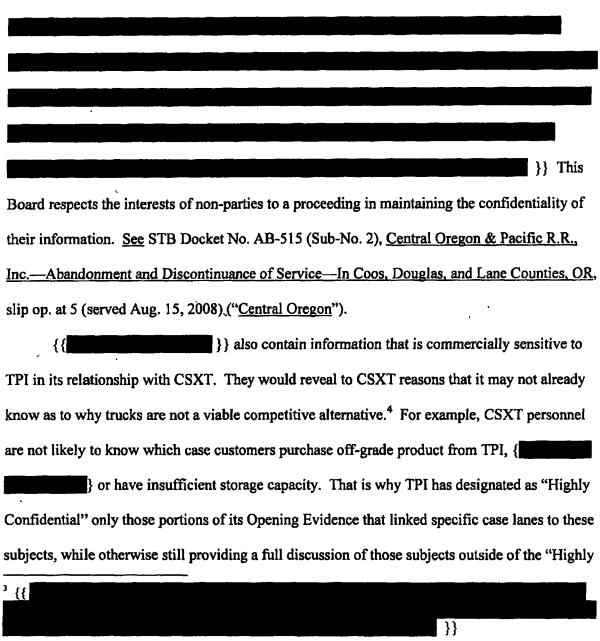
I. TPI HAS PROPERLY DESIGNATED THE ISSUE MATERIAL AS "HIGHLY CONFIDENTIAL" DUE TO ITS COMMERCIAL SENSITIVITY.

Paragraph 2 of the Protective Order defines as "Highly Confidential" material that contains "specific rate, traffic, or cost data or other competitively sensitive information."

Throughout its correspondence with TPI on this subject, CSXT has limited this definition to the examples of "specific rate, traffic or cost data" to contend that the e-mail and {{ }}

} have been improperly designated, while completely ignoring the inclusion of "other competitively sensitive information." See Motion at 6-7 and Exhibits C and F.

It is hard to imagine any subject that is more competitively sensitive to TPI than {{



⁴ CSXT calls this "Kafkaesque" because it seems to believe that a railroad cannot be market dominant if it doesn't know why it is market dominant. Motion, Ex. F, p. 2. The only thing "Kafkaesque," however, is the fact that the same counsel to CSXT in this proceeding recently argued to the STB, in Docket No. 42125, E.I. du Pont de Nemours and Company v. Norfolk Southern Railway Company, that market dominance is "solely" an objective standard that does not depend upon what a railroad subjectively thinks. See "Norfolk Southern Railway Company's Reply in Opposition to Motion to Compel of E.I. du Pont de Nemours & Company," p. 5 (filed April 25, 2011). Of course, there are both objective and subjective elements to market dominance, and CSXT's counsel was correct, in Docket 42125, that the objective question is whether there is an effective competitive alternative, not whether the railroad knows how or why an alternative may or may not be effective.

II. CSXT IS NOT PREJUDICED BY TPI'S "HIGHLY CONFIDENTIAL" DESIGNATIONS.

In an effort to overcome the weakness of its claim that TPI has wrongly designated the issue material as "Highly Confidential," CSXT alleges that TPI's designations are highly prejudicial to its ability to respond to TPI's Opening Market Dominance Evidence. CSXT Motion at 8-10. From the very outset of its correspondence with CSXT on this subject, TPI has expressed its willingness to find some compromise if CSXT could explain how it is prejudiced. Indeed, TPI went to great lengths to explain how CSXT's counsel could permissibly broach the subject matter of {{

⁶ <u>See CSXT</u> Motion at 6 (quoting <u>Central Oregon</u> for the proposition that any confidentiality designation must strike an "appropriate balance between legitimate access and legitimate protection.").

⁷ See, CSXT Motion, Exhibit E, p. 2 ("To the extent that you contend CSXT is prejudiced by these designations, please be more specific as to how, so that we can determine if there is an acceptable middle-ground for both TPI and CSXT."); Exhibit G, p. 4 ("Despite my May 9th invitation for CSXT to more fully explain its supposed prejudice, your letter is loaded mostly with unsupported assertions.").

confidentiality designations. ⁸ CSXT, apparently uninterested in any sort of compromise, has responded with generic assertions and unsupported claims that it repeats in its Motion.

-A. CSXT Has Not Demonstrated How Its Internal Personnel Are Prejudiced By TPI's Highly Confidential Designations.

⁸ See CSXT Motion, Exhibit G, pp. 2-4.

CSXT also suggests that it is unfair for TPI to rely upon its own personnel to sponsor evidence when CSXT cannot. This argument is a red-herring. {{

CSXT offers an impotent excuse for not providing such examples:

But it is of course impossible for CSXT to give examples of how its in-house employees could respond to specific allegations without disclosing those allegations to in-house personnel.

Moreover, CSXT has overlooked Paragraph 9 of the Protective Order, which states:

Information that is publicly available or <u>obtained outside of this</u> <u>proceeding from a person with a right to disclose it</u> shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding. [underline added]

Therefore, to the extent that CSXT personnel have independent knowledge of any subject matter
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nternal personnel. In addition, CSXT's counsel may pose general questions {{
}} to CSXT personnel in order to determine the scope of their
chowledge, {{ They are not free, however, to
lisclose that {{
}}
{ {

}} TPI shared this information with CSXT in its May 13th letter and offered to provide any additional clarification if CSXT believed such clarification was needed, but CSXT's response was to file this Motion. Notwithstanding CSXT's inferences to the contrary, TPI would not require CSXT's counsel to raise all eighteen subjects for all 158 customer locations with CSXT's internal personnel in order to comply with the "Highly Confidential" designation. See, Motion at 9-10. CSXT counsel is free to ask CSXT's internal personnel about their knowledge of any subject matter {{ }}, or subset thereof, to any customer destination, or subset thereof, without inquiring about all of them. CSXT is not permitted to disclose {{ factor is that CSXT counsel initiate their questions in a neutral fashion as described in Exhibit 1. B. CSXT Mischaracterizes TPI's Case As Depending Almost Entirely Upon the Highly Confidential Material. In an effort to further demonstrate prejudice, CSXT mischaracterizes TPI's Opening Market Dominance Evidence by asserting that {{ }} are TPI's "only evidence" (Motion at 2, 10) or its "primary evidence" (Id. at 4) of customer requirements, and that "nearly all lane-specific allegations [that TPI's customers require rail delivery] are designated "Highly Confidential" (Id. at 3). 10 Those are trumped up claims to portray a prejudice where none exists. TPI's evidence that its customers require rail delivery is far more extensive than {{ }} TPI has openly declared that all of its customers require rail cars for storage, and has identified which customers use TPI's product in medical applications, which

lanes involve very high volumes, which destinations are third-party processors or compounders,

¹⁰ CSXT's inconsistent descriptions of {{

It is quite telling that the only example CSXT provides of TPI designating most of its lane-specific market dominance evidence as "Highly Confidential" is Lane B-14. Motion at 3. Referring to page II-B-58 of TPI's Opening Evidence, CSXT asserts that TPI designated four of the five reasons why CSXT possesses market dominance over Lane B-14 as highly confidential, "thus shielding them from review by the allegedly market dominant carrier." Those five reasons are:

- The customer's preference for rail is consistent with a low volume of truck deliveries. The only highly confidential information is precisely how low.
- Direct truck rates are higher. The only highly confidential information is precisely how much higher.
- Transload costs are higher. The only highly confidential information is precisely how much higher.
- The cumulative 4-year increase in CSXT's rates. None of this is highly confidential.
- .**■** {{ ·

If this is the best example of prejudice that CSXT can present out of 105 case lanes, it has failed woefully to demonstrate prejudice.

Finally, CSXT's due process argument carries no weight. CSXT has failed to demonstrate that its internal personnel are in any position to respond to the subject matter in

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are many ways for CSXT personnel to apply whatever knowledge they possess of those subject
matters. Moreover, CSXT has engaged an expert witness from the polymer industry who is in a
position to review and respond to all highly confidential information. CSXT has not
demonstrated why its expert cannot protect its due process interest. The fact that CSXT merely
tosses out the term "due process" at the end of its Motion based upon trumped up allegations
falls far short of raising a genuine due process concern.

III. A WHOLESALE REDESIGNATION OF THE ENTIRE CONTENTS OF THE ISSUE MATERIAL IS NOT APPROPRIATE, AND TPI SHOULD BE PROVIDED THE OPTION OF WITHDRAWING ANY REDESIGNATED MATERIAL FROM THE RECORD.

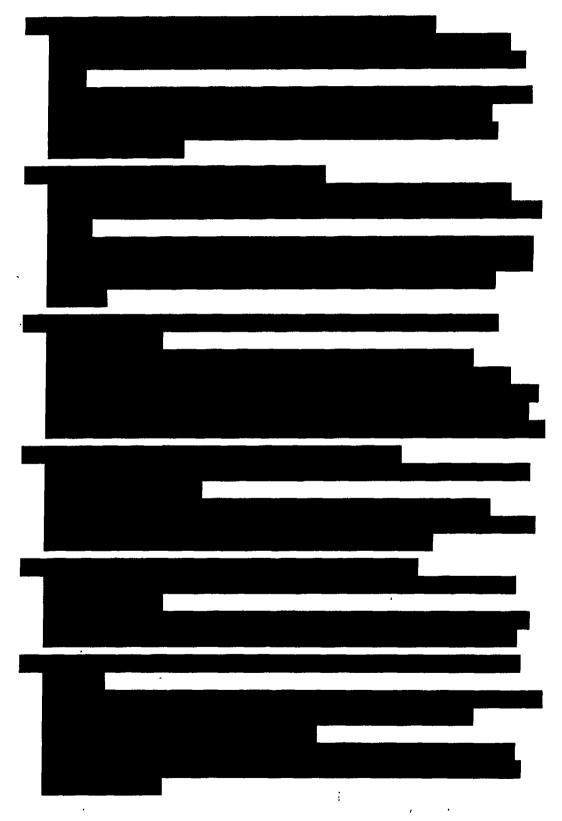
Furthermore, if the Board redesignates the confidentiality of any of these documents, TPI requests that the Board give TPI the option to withdraw a portion, or all, of the material from the record. TPI made its "Highly Confidential" designations in good faith and the option to withdraw material from the record may be necessary {{

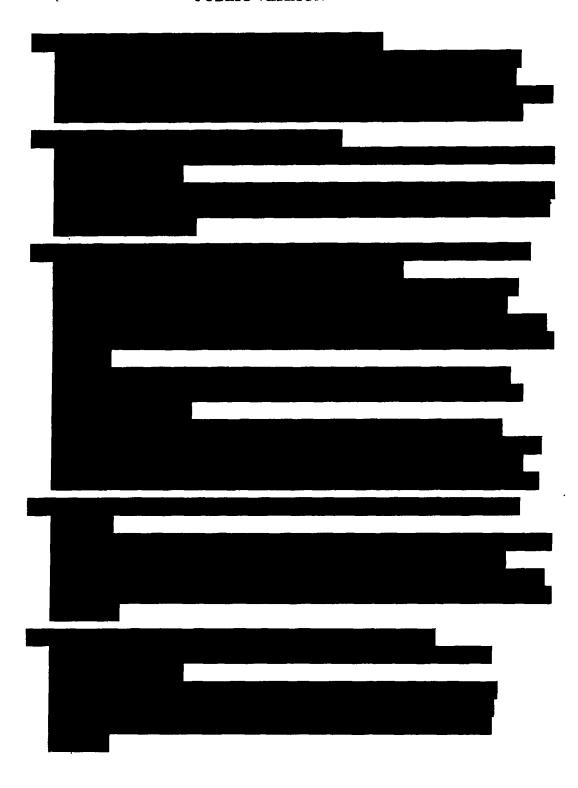
Respectfully submitted,

Jeffrey O. Moreno David E. Benz Thompson Hine LLP 1920 N Street, N.W., Suite 800 Washington, D.C. 20036 (202) 331-8800

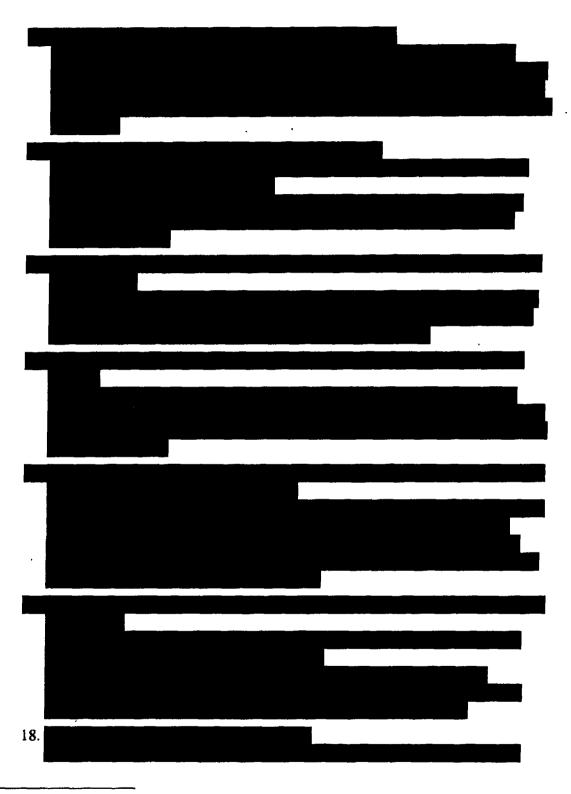
May 19, 2011







¹¹ TPI inconsistently designated this information as "Highly Confidential" on page II-B-23 of its Opening Evidence, but as Public in the Part II-B-4 Lane Summaries. TPI hereby redesignates all of the "Highly Confidential" information on page II-B-23 as "Confidential."



¹² TPI inconsistently designated this information as "Highly Confidential" on page II-B-24 of its Opening Evidence, but as Public in the Part II-B-4 Lane Summaries. TPI hereby redesignates the first "Highly Confidential" designation on page II-B-24 as "Public."

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CERTIFICATE OF SERVICE

I hereby certify that this 19th day of May 2011, I served a copy of the foregoing upon CSXT in the following manner and at the addresses below:

Via e-mail and first-class mail to:

G. Paul Moates	
Paul Hemmersbaugh	
Sidley Austin LLP	
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David E. Benz